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No. 83-1229

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD JOHN LONGSTAFF, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly denied naturalization because he acknowledged that he was a homosexual at the time he entered the United States and therefore was not "lawfully admitted" as required by 8 U.S.C. 1427(a)(1).

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OPINIONS BELOW

The September 28, 1983 opinion of the court of appeals (Pet. App. A35-A60) is reported at 716 F.2d 1439. The March 25, 1982 opinion of the district court (Pet. App. A28-A34) is reported at 538 F. Supp. 589. The October 31, 1980 opinion of the court of appeals (Pet. App. A12-A14) is not reported. The March 9, 1979 opinion of the district court (Pet. App. A10-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1983. A petition for rehearing was denied on October 27, 1983 (Pet. App. A61). The petition for a writ of certiorari was filed on January 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 provides that certain "classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States." 8 U.S.C. 1182(a). Among these classes are "[a]liens afflicted with psychopathic personality, sexual deviation, or a mental defect." 8 U.S.C. 1182(a)(4). Homosexuals are within the coverage of this provision. *Boutilier* v. *INS*, 387 U.S. 118 (1967); *Hill* v. *INS*, 714 F.2d 1470, 1472 n.1 (9th Cir. 1983).

The Act also establishes procedures to be followed when aliens seek admission into the United States Aliens suspected of being excludable on the grounds specified in Section 1182(a) may be detained upon arrival "for a sufficient time to enable the immigration officers and medical officers to subject [them] to observation and an examination sufficient to determine whether * * * they belong to the excluded classes." 8 U.S.C. 1222. When a physical or mental examination is deemed appropriate, it is conducted by "medical officers of the United States Public Health Service, who * * * shall certify, for the information of the immigration officers * * *, any physical and mental defect or disease observed." 8 U.S.C. 1224. If such a certification is given, "the decision of the special inquiry officer shall be based solely upon such certification." 8 U.S.C. 1226(d). Even when an examination is not conducted and a certification is not provided, however, "the burden of proof shall be upon [an alien seeking admission] to establish that he * * * is not subject to exclusion under any provision of [the Act]." 8 U.S.C. 1361.

Once an alien is "lawfully admitted" into the United States and has resided continuously for at least five years, he may file a petition for naturalization. 8 U.S.C. 1427(a)(1). As in exclusion proceedings, "[t]he burden of proof shall be

upon [the alien] to show that he entered the United States lawfully." 8 U.S.C. 1429.

2. Petitioner was admitted to the United States as a permanent resident on November 14, 1965 (Pet. App. A17). The Application for Immigrant Visa and Alien Registration that he filled out before arriving asked (Pet. App. A36 (citation omitted)):

> Are your now or have you ever been afflicted with psychopathic personality, epilepsy, mental defect, fits, fainting spells, convulsions or a nervous breakdown?

Congress intended the phrase "psychopathic personality" to include homosexuals.[1] Apparently unaware of the significance of the term, petitioner answered "No." Petitioner was also examined by the Public Health Service (PHS) at the time of his entry, but no basis for exclusion was observed, and no certificate issued. Pet. App. A30-A31, A36; Pet. 4.

On September 19, 1975, petitioner applied for citizenship (Pet. App. A29). In the course of the naturalization proceedings petitioner freely testified that he had been a homosexual " 'as far back as [he could] remember' " and that he had " 'always been a homosexual, . . . from birth' " (*id.* at A48 (citation omitted; brackets in original)). Petitioner also testified about his participation in homosexual activities before and after his arrival in the United States (*id.* at A20,

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[1]The phrase "psychopathic personality" appearing in 8 U.S.C. 1182(a)(4) was originally intended by Congress to include homosexuals. *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967). On October 3, 1965, Congress amended that section and added the phrase "sexual deviation" to make its purpose clearer. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 919; S. Rep. 748, 89th Cong., 1st Sess. 19 (1965). Although petitioner was admitted to the United States a month later, the form quoted in text was filled out prior to his arrival (Pet. App. A36).

A48), concluding that he considered himself " 'now a known homosexual in the community' " (*id.* at A48 (citation and footnote omitted)).

On the basis of this testimony the United States District Court for the Northern District of Texas originally denied naturalization because petitioner had failed to carry his burden of establishing good moral character, as required by 8 U.S.C. 1427(a)(3), and had exhibited a lack of candor in answering questions (Pet. App. A10-A11). The court of appeals affirmed on the former ground (*id.* at A12-A14), but on petition for rehearing remanded to give petitioner a chance to adduce additional evidence of his good character (*id.* at A16). On remand the district court reaffirmed its original decision, adding that petitioner was in any event not entitled to naturalization because he had been excludable under 8 U.S.C. 1182(a)(4) and therefore had not been "lawfully admitted" to the United States (Pet. App. A28-A34).

3. The court of appeals affirmed (Pet. App. A35-A60). Petitioner contended there that, even though he may have been excludable, he had been granted a visa and admitted in a procedurally regular fashion, and so was eligible for naturalization. The court rejected that contention: "Admission is not lawful if it is regular only in form. The term 'lawfully' denotes compliance with substantive legal requirements, not mere procedural regularity" (Pet. App. A38). The Immigration and Naturalization Service's failure to detect an excluding mental or physical condition at the time of admission, the court held, does not bar further inquiry into the subject in the course of naturalization proceedings (*id.* at A50-A51).

Petitioner alternatively argued that homosexuals were not excludable under 8 U.S.C. 1182(a)(4) unless they had been examined and certified by PHS doctors in accordance with 8 U.S.C. 1224. Because no certificate had been issued

in his case, petitioner continued, he was not excludable, and therefore was eligible for naturalization. The court of appeals found no basis for this argument in the Act. 8 U.S.C. 1224 does say that Public Health Service officers "shall conduct all medical examinations and shall certify" the existence of any defects they find. But that does not mean that examinations are the only means of ascertaining homosexuality (Pet. App. A43-A46). Similarly, the provision in the Act making a medical certification conclusive evidence of excludability (8 U.S.C. 1226(d)) does not mean that excludability cannot be shown by other means (Pet. App. A46). Indeed, the court observed (*id.* at A50):

> To remand the case for a medical determination of homosexuality would appear to be to ask for a certification of the obvious. It is patent that sexual preference cannot be determined by blood test or physical examination; even doctors must reach a decision by interrogation of the person involved or of others professing knowledge about that person. To require the INS to disregard the most reliable source of information, the statements of the person involved, would be to substitute secondary evidence for primary.

The court of appeals found support for its conclusion in the interpretation given the Act by the INS, the administrative agency charged with its enforcement (Pet. App. A53). In 1979 the Surgeon General of the United States announced that the PHS would no longer conduct examinations of aliens for homosexuality, since homosexuality was not a mental disorder, nor could it be ascertained through medical diagnostic procedures (*id.* at A42). The INS has nevertheless continued to exclude self-proclaimed homosexuals

without either examination or certification by the PHS (*id.* at A52-A53).[2]

ARGUMENT

The decision of the court of appeals is plainly correct. While the court's reasoning conflicts with the Ninth Circuit's decision in *Hill* v. *INS*, 714 F.2d 1470 (1983), the difference is insignificant as a practical matter and will not result in inconsistent enforcement of the Act. The petition should therefore be denied.

1. The court of appeals' decision correctly construes the Immigration and Nationality Act. 8 U.S.C. 1429 states that

> no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter. The burden of proof shall be upon such person to show that he entered the United States lawfully * * *.

Among the "provisions of this chapter" to which Section 1429 refers is the restriction found in 8 U.S.C. 1182(a):

> [T]he following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect * * *.

Section 1182(a)(4) unquestionably was intended to exclude homosexuals from admission. See S. Rep. 748, 89th Cong., 1st Sess. 18-19 (1965); *Boutilier* v. *INS*, 387 U.S. 118, 120 (1967).

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[2]Judge Tate dissented (Pet. App. A55-A60). In his view, "a homosexual may not lawfully be denied admission in the absence of a medical certificate to that effect" (*id.* at A56).

It is frivolous to suggest that petitioner has carried the burden of proof imposed on him by 8 U.S.C. 1429 when he himself admits that he has " 'always been a homosexual, . . . from birth' " (Pet. App. A48 (citation omitted)). Cf. *Boutilier* v. *INS*, 387 U.S. at 122-123 ("we do not now disturb that finding, especially since petitioner admitted being a homosexual at the time of his entry"). Even in this Court petitioner does not dispute the lower courts' conclusion that he is now a homosexual and was one at the time he entered the United States. Nor does petitioner contend that a medical examination — either by a PHS officer or by a doctor of his own choice — would produce a contrary finding.[3]

Petitioner contends, however, relying on 8 U.S.C. 1224-1226, that a determination of excludability (for homosexuality) can only rest on a PHS medical certification, and that none was issued in his case (Pet. 7-8). But nothing in those Sections or elsewhere in the Act states that a medical

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[3]It is true that petitioner — notwithstanding the restriction in Section 1182(a) — was admitted to the United States as a permanent resident in 1965. But that fact, as the court of appeals correctly noted, is not conclusive on the question of petitioner's excludability in a subsequent naturalization proceeding (Pet. App. A50-A51). Cf. *Fedorenko* v. *United States*, 449 U.S. 490, 514-515 (1981) (denaturalization); *Boutilier* v. *INS*, 387 U.S. at 119-120 (deportation); *Canciamilla* v. *Haff*, 64 F.2d 875, 876 (9th Cir. 1933) (deportation); *In re La Rochelle*, 11 I. & N. Dec. 436, 438 (1965) (deportation). No dispute about petitioner's homosexuality arose at the time of his admission, in large part because he answered "No" to the question on his visa application designed to elicit information about that issue. The INS's failure to discover petitioner's condition during his pre-visa medical examination or at the time of his arrival is unsurprising, given the cursory nature of those procedures and the type of exclusion involved. See Pet. App. A46 (INS officers "spent an average of only 38 seconds examining each alien and his papers"); *Santiago* v. *INS*, 526 F.2d 488 (9th Cir. 1975) (en banc), cert. denied, 425 U.S. 971 (1976) (INS not estopped in deportation case even where immigration officer at port of entry should have recognized that entry was unlawful).

examination and certification are required in order to exclude self-proclaimed homosexuals. Section 1224 simply requires that when an examination is conducted it must be done by PHS officers, and that if they observe any "defect or disease" they must so certify to the immigration and special inquiry officers. Section 1225(a) empowers

> [t]he Attorney General and any immigration officer, including special inquiry officers, * * * to take and consider evidence of or from any person touching the privilege of any alien * * * to enter * * * or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter * * *.

It would be odd if, in the course of taking such evidence, the INS were required to ignore the alien's own admission that he fell within one of the classes Congress wished to exclude.[4] Finally, Section 1226(d) states that when a certification is issued under Section 1224 it shall be deemed conclusive. But nothing in Section 1226(d) makes certification the *only* method by which excludability may be shown.[5]

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[4]It is well settled that an agency may dispense even with those fact-finding procedures that are statutorily required in cases where the facts are not in dispute. See, *e.g.*, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620-621 (1973); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[5]The cases cited by petitioner (Pet. 8-10 & nn. 3-4) (with the exception of *Hill* v. *INS, supra*) are not inconsistent with this understanding of the statute. In *United States ex rel. Johnson* v. *Shaughnessy*, 336 U.S. 806, 813 (1949), the alien "emphatic[ally] deni[ed] any condition which could justify her classification as a mental defective." In *Kovacs* v. *United States*, 476 F.2d 843, 845 (2d Cir. 1973), the court denied naturalization to an alleged homosexual because of "doubts as to [his] truthfulness at the initial hearing." In *United States ex rel. Wulf* v. *Esperdy*, 277 F.2d 537 (2d Cir. 1960), the court held that the alien was excludable under 8 U.S.C. 1182(a)(6) on the basis of a medical certificate. *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971), involved the issue whether an alien who had engaged in homosexual activities within five

Congress itself recognized, in passing the Immigration and Nationality Act, that "considerable difficulty may be encountered in substantiating a diagnosis of homosexuality." The reason for this conclusion was that "there are no reliable laboratory tests which would be helpful in making [the] diagnosis." H.R. Rep. 1365, 82d Cong., 2d Sess. 47 (1952) (Report of the Public Health Service on the Medical Aspects of H.R. 2379). But if Congress entertained doubts about the special ability of doctors to identify homosexuals, it is hard to believe that it would have insisted on a medical examination and certification in cases where more reliable evidence was volunteered by the alien himself. Indeed, both

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years of the date of his petition was "a person of good moral character" within the meaning of 8 U.S.C. 1427(a)(3) — an issue not addressed by the court of appeals in this case (Pet. App. A55 n.58). Finally, *In re Hollinger*, 211 F. Supp. 203, 205 (E.D. Mich. 1962), was a case in which the alien apparently contested the issue of her insanity, and in which in any event the court found that the Board of Immigration Appeals had "expressly waived this disability."

Petitioner suggests (Pet. 12) that if homosexuals may be excluded on the basis of their own admissions, "aliens entering the United States as tourists can be labeled 'homosexual,' 'insane,' or 'mentally retarded,' without the medical certification required by the Act[.]" This suggestion, however, ignores the most salient fact of this case, and distorts the enforcement procedure currently employed by the INS for the exclusion of homosexual aliens. Petitioner has not been "labeled 'homosexual' " in some arbitrary or random fashion by the INS; his excludability on that ground is an issue only because he volunteered the information. As we explain below, page 12, that is now the *only* way in which homosexual aliens entering the country are identified. It may be that for some—perhaps most—personality disorders and mental defects, the individual's own statements are not as reliable as a medical certification and should not suffice as grounds for exclusion. Cf. *United States ex rel. Saclarides* v. *Shaughnessy*, 180 F.2d 687 (2d Cir. 1950) (mongolism); *In re Hollinger, supra* (schizophrenia); *United States ex rel. Johnson* v. *Shaughnessy, supra* (mental defective); *United States ex rel. Wulf* v. *Esperdy, supra* (tuberculosis). Petitioner, by contrast, is a mature, articulate, and acknowledged homosexual. His condition, unlike mongolism or schizophrenia, for example, in no way bears on his capacity for self-assessment.

Congress and the PHS acknowledged when the Act was passed that "[o]rdinarily, a history of homosexuality must be obtained from the individual" (*ibid.*).[6]

These explicit statements by the Congress that passed the Act demonstrate convincingly the essential meaninglessness of the rule for which petitioner argues. Petitioner "does not question the substantive issue of whether Congress intended to exclude homosexual aliens" under 8 U.S.C. 1182(a)(4). See Pet. 7. Petitioner also does not deny that he is a homosexual and was one at the time he entered the United States, in violation of Section 1182(a)(4). Neither does he contend that a medical examination would produce a contrary finding. If such an examination were ordered, the doctor's conclusion would be based on precisely the same admissions petitioner has already volunteered in the course of his naturalization proceedings. No laboratory tests would be conducted. Congress believed in 1952 that "[s]ome psychological tests may be helpful in uncovering homosexuality of which the individual, himself, may be unaware." H.R. Rep. 1365, *supra*, at 47. But see page 11, *infra*. Whether or not that is so, such tests would be superfluous in petitioner's case. In short, petitioner's only argument is that he is entitled to have a doctor certify second hand, based on petitioner's own statements, what petitioner has already testified to in person. It is frivolous to suggest that Congress conditioned exclusion on the performance of such a redundant exercise.

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[6]Accordingly, it has not been the practice of the INS to insist on a certification in cases of self-proclaimed homosexuals. The Office of Legal Counsel, after studying that very issue, recently noted that "[s]ince 1952, the exclusion of homosexual aliens has been enforced both unilaterally by the INS, *e.g., relying on an alien's admission of homosexuality* and jointly, subsequent to a certification by the PHS that particular aliens are afflicted with a 'mental defect or disease,' *i.e.*, homosexuality." 3 Op. Off. of Legal Counsel 457, 457-458 (1979) (emphasis added).

2. The court of appeals acknowledged that, in holding that self-proclaimed homosexuals could be excluded without a certificate from the PHS, it was disagreeing with a contrary decision of the Ninth Circuit in *Hill* v. *INS, supra* (Pet. App. A47, A54 n.56). We concede that this case and *Hill* conflict on the issue of the excludability of uncertified but self-proclaimed homosexuals. We nevertheless believe that the issue is too insignificant to warrant certiorari, particularly in light of the steps the government has taken in response to *Hill* to ensure evenhanded enforcement of the immigration law.

a. On August 2, 1979, the Surgeon General announced that PHS personnel would no longer issue medical certificates in cases where aliens referred to them were suspected of being homosexual. That action was taken for two reasons. First, the Surgeon General determined that according to " 'current and generally accepted canons of medical practice' " homosexuality is no longer properly characterized as a mental disorder. *Hill* v. *INS*, 714 F.2d at 1472 (quoting 56 Interpreter Releases 387, 398 (1979)). Second, " 'the determination of homosexuality is not made through a medical diagnostic procedure' " (714 F.2d at 1473).

In response, the INS initially allowed suspected homosexuals to enter the country conditionally on parole status. See 8 U.S.C. 1182(d)(5).[7] On September 9, 1980, the INS adopted new Guidelines and Procedures for the Inspection of Aliens Who Are Suspected of Being Homosexual (App.

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[7]INS consulted the Office of Legal Counsel, which concluded that the Surgeon General had no authority to determine that homosexuality is not a mental defect or disease for purposes of applying the Immigration and Nationality Act, though he could determine as a matter of fact that referral of aliens to the PHS for certification of homosexuality would be unhelpful. The Office of Legal Counsel opinion concluded by suggesting that INS promulgate a uniform policy for investigating suspected homosexuals. *Hill* v. *INS*, 714 F.2d at 1473.

A, *infra*, 1a-2a). The Guidelines state that an arriving alien will not be asked any questions about his or her sexual preference.[8] Only if the alien "makes an unsolicited, unambiguous oral or written admission of homosexuality," or if a third person who is also presenting himself for inspection "voluntarily states, without prompting or prior questioning, that an alien who arrived in the United States at the same time * * * is a homosexual," will the alien be examined privately by an immigration official and asked to sign a statement declaring that he or she is a homosexual (App. A, *infra*, 1a-2a). The exhibition of buttons, literature, or other similar material does not qualify as the kind of "unambiguous * * * admission of homosexuality" that will permit further examination (*ibid.*). Moreover, when the alien is examined privately he is asked "*only* whether he or she is homosexual. If the answer is 'no', the alien shall not be detained for further examination" (*id.* at 2a (emphasis in original)). The Guidelines specifically state that "[n]o search * * * is to be performed for the purpose of seeking evidence of homosexuality" (*ibid.*).

If the arriving alien admits during private examination to being a homosexual, a hearing is held before an immigration judge and the alien is excluded based on his admission. No medical certificate is obtained. *Hill* v. *INS*, 714 F.2d at 1473. The effect of the INS's current policy is that an arriving homosexual alien will be excluded only if he wishes to make an issue of the current enforcement policy, by repeatedly proclaiming his homosexuality at the time of entry.

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[8]The application for Immigrant Visa and Alien Registration does continue to ask, in accordance with the statute (8 U.S.C. 1182(a)(4)), whether the excludable condition of "sexual deviation" applies to the applicant (Pet. App. A52-A53 n.54).

b. In *Hill* v. *INS, supra,* the alien, a subject of Great Britain, presented himself as a nonimmigrant visitor for pleasure at San Francisco International Airport. Although he possessed a valid visitor's visa, Hill made an unsolicited statement to the immigration inspector that he was a homosexual. The inspector then issued Hill a form notifying him that he appeared to be excludable under 8 U.S.C. 1182(a)(4). At the exclusion hearing Hill again stated that he was a homosexual and acknowledged his earlier statement to the INS officer.

The Ninth Circuit held that, despite Hill's several admissions that he fell within an excludable category of aliens, Hill could not be excluded because the PHS had not issued a medical certificate attesting to his homosexuality. Like petitioner, the Ninth Circuit believed that 8 U.S.C. 1224, 1225 and 1226(d) require exclusions to be based on medical examination and certification. 714 F.2d at 1474-1475.[9] The court of appeals in *Hill* found support for this belief in the legislative history, which showed that "Congress and the PHS thought, at the time of the adoption of the Act, that homosexuality was diagnosable" (*id.* at 1476).[10] The Ninth Circuit did not say exactly what was to be done during the examination it prescribed, nor what medical evidence would support the issuance of a certificate. It stressed only that the examination was to be "meaningful" (*id.* at 1479) and "made solely by trained physicians" (*id.* at 1475).

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[9]The Ninth Circuit did acknowledge, however, that "[t]he Act does not explicitly state that a medical certificate is required for exclusion under 8 U.S.C. § 1182(a)(4)." 714 F.2d at 1474.

[10]As we pointed out above, pages 9-10, *supra*, it may be doubted whether Congress or the PHS in fact entertained such a belief even in 1952. In any event it is a non-sequitur to argue, as the Ninth Circuit did (714 F.2d at 1476), that because latent homosexuality can be diagnosed, repeated, unsolicited admissions of homosexuality must be ignored in exclusion proceedings.

c. We of course disagree with the Ninth Circuit's decision in *Hill* for the same reasons we oppose petitioner's claim that he is not excludable and hence is entitled to citizenship. The Solicitor General nevertheless has decided not to seek certiorari in *Hill*, because the number of aliens who will be admitted pursuant to that decision (and who otherwise would be excluded) is likely to be trifling. Under the INS's current policy of asking no questions about the sexual preference of arriving aliens, and of excluding only those who volunteer admissions of their homosexuality (or who admit to being homosexuals after having been identified by someone entering simultaneously), the only homosexuals who are excluded are those who insist on making an issue of their homosexuality.[11]

It is true that if the PHS were to continue declining to issue certificates in the Ninth Circuit, there would be a minor inconsistency in the enforcement of the immigration law: homosexuals entering in the Ninth Circuit could announce their homosexuality to the INS and still be admitted, while those entering in the Fifth Circuit would have to refrain from volunteering such statements. That difference would hardly be worthy of plenary review by this Court. In order to make the enforcement of the immigration law as uniform as possible, however, the Acting Deputy Attorney General, by letter dated April 5, 1984, has instructed the Assistant Secretary for Health in the Department of Health and Human Services to conform PHS practices to the decision in *Hill*. The letter states (App. B, *infra*, 3a-4a):

> [I]n order for the Immigration and Naturalization Service to carry out its congressionally mandated responsibility in the Ninth Circuit, you are required to

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[11]We are informed by the INS that in 1981 only one such person was excluded after a formal hearing. In 1982 no alien was excluded.

> instruct the Public Health Service to resume the process for issuance of the certificates referred to in 8 U.S.C. 1224 for self-proclaimed homosexual aliens seeking admission in the Ninth Circuit who are referred by the Immigration and Naturalization Service to a Public Health Service officer for examination.

Thus self-proclaimed homosexuals — the only group against whom the statutory direction in 8 U.S.C. 1182(a)(4) ("sexual deviation") is now effectively enforced — will in the future be excluded in both the Fifth and Ninth Circuits, as well as elsewhere. The only difference is that in the Ninth Circuit the exclusion will be based on a PHS certification (8 U.S.C. 1226(d)) issued on the strength of the alien's own admissions (App. B, *infra*, 4a), while in the rest of the country the exclusion will rest on the ground that the alien, by virtue of his voluntary acknowledgement of an excludable characteristic, has failed to sustain his burden of proving admissibility (8 U.S.C. 1361). Either ground is, of course, a sufficient basis for exclusion under the Immigration and Nationality Act.

We wish to emphasize that the resulting difference in enforcement between the Ninth Circuit and the rest of the country is purely a procedural one, not affecting the substantive rights of any alien. The Ninth Circuit did not hold that homosexuality is not a basis for exclusion under the Act. 714 F.2d at 1472 n. 1. The only disagreement among the circuits concerns the proper method for proving a fact that is not disputed—the homosexuality of entering aliens who proclaim themselves to be homosexuals. Though it is senseless to conduct a medical examination at all under these circumstances, cf. *Codd* v. *Velger*, 429 U.S. 624, 627 (1977), doing so in the Ninth Circuit will have little impact on the government's enforcement responsibilities, and none on the outcome of any exclusion proceeding. For that reason, and in order to remove all effects of the conflict with

this case (and therefore any possible need for review by this Court of this otherwise inconsequential issue), we have decided to follow the procedures required by *Hill* in excluding self-proclaimed homosexuals in the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

The policy cable cited August 14, 1979 regarding the inspection of an alien suspected of being excludable solely on the basis of being homosexual is rescinded. Operations instructions are amended as follows: 235.15 - *guidelines and procedures for the inspection of aliens who are suspected of being homosexual.*

1. Prior to August 2, 1979, this Service's procedure concerning the inspection of an alien believed to be a homosexual was to refer that individual to a medical officer of the United States Public Health Service for a medical examination. Effective that date, the Surgeon General instructed Public Health Service officers not to accept immigration referrals when the sole basis for the referral was to establish homosexuality as a mental disease or defect. His decision was based upon the American Psychiatric Association's determination that homosexuality is no longer considered to be a mental disorder.

2. The intent of Congress to include homosexuals within the terms of Section 212(a)(4) has been established by the legislative history of the 1952 enactment and its 1965 amendment, as well as the Supreme Court's interpretation of the 1952 Act, (*Boutilier* v. *I & NS*, 387 U.S. 118 (1967)). The Department of Justice, Office of Legal Counsel, has determined that where non-medical evidence establishes homosexuality, the INS is not required to refer the alien to the United States Public Health Service for examination.

3. *Primary Inspection* - an alien shall not be asked any questions concerning his or her sexual preference during primary inspection.

4. *Referral to Secondary Inspection* - an alien shall be referred to secondary inspection for examination as to homosexuality only under the following circumstances: (1) when an alien makes an unsolicited, unambiguous oral or

written admission of homosexuality. Buttons, literature or other materials referring to "gay rights" or describing or supporting homosexuality shall not be considered unambiguous admissions of homosexuality. (2) When a third party who presents him or herself for inspection voluntarily states without prompting or prior questioning that an alien who arrived in the United States at the same time and is then being processed for admission is a homosexual. You should note that the likelihood of a third-party stating that an alien is homosexual is remote.

5. *Secondary Inspection* - an alien referred to secondary inspection for examination as to homosexuality shall be questioned privately. Inspectors must perform their duties in a professional manner and not allow personal beliefs to taint the inspection of the alien. An alien referred under paragraph 4 shall be asked *only* whether he or she is homosexual. If the answer is "no", the alien shall not be detained for further examination as to homosexuality. If the answer is "yes", the alien shall be asked to sign a statement to that effect. Whether or not the alien executes a statement, he or she shall be referred to an immigration judge for an exclusion proceeding in accordance with 8 CFR 235.6, or when appropriate, to the district Director for processing under 8 CFR 235.7

6. No search under Section 287(c) is to be performed for the purpose of seeking evidence of homosexuality.

APPENDIX B

April 5, 1984

Dr. Edward N. Brandt, Jr., M.D.
Assistant Secretary for Health
Department of Health and Human Services
200 Independence, S.W.
Room 716G
Washington, D.C. 20201

Dear Dr. Brandt:

The Solicitor General has determined that the government will not file a petition for a writ of certiorari to review the decision of the Ninth Circuit in *Hill* v. *Immigration and Naturalization Service*, 714 F.2d 1470 (1983).

Hill, which establishes the law applicable in the Ninth Circuit, holds that the Immigration and Naturalization Service may not exclude an alien under 8 U.S.C. 1182(a)(4) based solely on the alien's unsolicited admission of homosexuality to an immigration official, and that a medical certificate issued by the Public Health Service certifying the alien to be homosexual is required. As you know, Congress intended homosexuality to be one of the grounds for exclusion under that section of the Immigration and Nationality Act. Even though the Immigration and Naturalization Service does not question entrants about their sexual preference, it has a statutory responsibility to exclude self-proclaimed homosexuals.

Accordingly, in order for the Immigration and Naturalization Service to carry out its congressionally mandated responsibility in the Ninth Circuit, you are required to instruct the Public Health Service to resume the process for issuance of the certificate referred to in 8 U.S.C. 1224 for

self-proclaimed homosexual aliens seeking admission in the Ninth Circuit who are referred by the Immigration and Naturalization Service to a Public Health Service officer for examination. We do not read the law to require, in such circumstances, that the certificate be based on anything other than the alien's own statement of homosexuality.

Your cooperation in this matter is appreciated.

Sincerely,

D. Lowell Jensen
Acting Deputy Attorney General